89-929

NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

ULYSSES ABBOTT,
TYREE BIGGS, et al.,

Petitioners

v.

GOULD, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the Workers' Compensation Act of Nebraska, which permits an employer to renounce its duties to report, compensate and cure known disability; to elect intentionally to injure the employee through conspiracy with the plant physician by the administration without informed consent of contraindicated drugs that artificially lower blood lead levels and then to hide behind the exclusivity provision of the Compensation Act if ever it is caught is arbitrary and capricious and violates the due process secured by the Fourteenth Amendment to the Constitution of the United States which at a minimum calls for prompt and certain compensation.

Whether an employee's or any victim's due process rights under the Fourteenth

Amendment to the Constitution of the United States are violated when his common law right to sue for an intentional physical injury is taken from him?

PARTIES

Defendants: Gould, Inc., Respondent
Dr. Sidney Lerner
Dr. Robert J. Fitzgibbons

Plaintiffs Petitioners:

Ulysses Abbott	Doc. 854	No. 721
Tyree Biggs, Sr.		722
London Blount		723
Lindsey Bonaparte		724
Jasper Brown		725
Charles Bunton		726
Lonnie Bunton		727
William Cleveland		728
Earnest Clinkscale		729
Jackson Cooper		730
Alexander Easter		731
Howard Freeman		732
Louis E. Gantt		733
William Harris		734
Jackson Hunter		735
Carl E. Jackson		736
Benard James		737
Lonnie Johnson		738
Leola Jones, Personal Rep. of Harry Jones		739
John E. Jones		740
Jimmy Lewis		741
Bobby Joe Loud		742
Charles Marrs		743
James L. Martin		744
Leon Mason		745
Billy R. Mays		746
James L. Moore		747
Alfred R. McGee		748
Marcell Moore		749

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The Opinion of the Nebraska Supreme Court is reported at 232 Neb. 907, 443 N.W.2d 591.

JURISDICTION

The decision of the Trial Court sustaining Gould's demurrer was affirmed by the Supreme Court of Nebraska on July 21, 1989 and a Rehearing was denied October 13, 1989.

This Petition for Certiorari is filed pursuant to 28 U.S.C. 1257(a) permitting for review by writ of certiorari by the Supreme Court of final judgments rendered by the highest court of a State, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 14 to the Constitution of the United States

> Section 1
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Workers' Compensation Act of Nebraska, Neb. Rev. Stat. §48-101, et seq. (Reissue 1988)

> 48-101. Employer's liability; negligence; compensation. When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.
>
> 48-102. Employer's liability; negligence; action; defenses denied. In all cases brought under sections 48-101 to 48-108, it shall not be a defense (a) that the employee was negligent, unless it shall also appear that such negligence was

willful, or that the employee was in a state of intoxication; (b) that the injury was caused by the negligence of a fellow employee; or (c) that the employee had assumed the risks inherent in, or incidental to, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which grounds of defense are hereby abolished.

48-109. Compensation; schedule; duty to observe. If both employer and employee become subject to sections 48-109 to 48-147, both shall be bound by the schedule of compensation provided in this act, which compensation shall be paid in every case of injury or death caused by accident or occupational disease arising out of and in the course of employment, except accidents caused by, or resulting in any degree from the employee's willful negligence as defined in section 48-151.

48-110. Compensation; liability; scope. When employer and employee shall by agreement, express or implied, or otherwise as provided in section 48-112 accept the provisions of sections 48-109 to 48-147, compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer, according to the schedule provided in this act, in all cases except when the injury

or death is caused by willful negligence on the part of the employee. The burden of proof of such fact shall be upon the employer.

48-111. Compensation; election; effect; exemption from liability; exception. Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in sections 48-109 to 48-147, and an acceptance of all the provisions of said sections, and shall bind the employee himself, and for compensation for his death shall bind his legal representatives, his widow and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency.

48-120. Medical, surgical, and hospital services; employer's liability; physician, right to select; procedures; powers ad duties; court; powers. The employer shall be liable for all reasonable medical, surgical, and hospital services, including plastic or reconstructive but not cosmetic surgery when the injury has caused disfigurement, appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten

the employee's restoration to health and employment,...

48-144.01. Injuries; reports; time within which to file. In every case of reportable injury occurring in the course of employment, the employer or insurance carrier shall file a report thereof with the compensation court. Such report shall be filed within forty-eight hours in case of each injury resulting in either a death or in the hospitalization of five or more employees from one accident and within seven days in case of all other reportable injuries after the employer or insurance carrier has been given notice or has knowledge of any such injury. Reportable injuries are any occupational injuries or illnesses which result in: (1) Fatalities regardless of the time between the injury and death, or the length of the illness; (2) lost workday cases, other than fatalities that result in lost workdays; or (3) nonfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment, or involve loss of consciousness or restriction of work or motion and include any diagnosed occupational illnesses which are reported to the employer but which are not classified as fatalities or lost workday cases.

STATEMENT OF CASE

On September 8, 1986 petitioners Ulysses Abbott and Tyree Biggs filed petitions in the District Court for Douglas County, Nebraska against Gould, Inc. and Doctors Sidney Lerner and Robert J. Fitzgibbons. Abbott and Biggs had been employees at the Gould smelter at 555 Farnam Street, Omaha until it closed in May 1982 and complained of illnesses they had contracted in Gould's employ.

Subsequently, two hundred eleven other workers filed similar individual petitions. The workers with two exceptions are African Americans, many of whom had come from the South or were recruited from prisons. On December 3, 1986 the court consolidated the Abbott case with all after-filed cases for

purposes of preliminary motions and discovery.

The petition in the trial court stated that petitioner Tyree Biggs, Jr., who resides at 630 North 35th Street, Omaha, and is married, was employed by Gould for a period commencing in or about January 1960 until October 1963 and again in or about February 1964 until about February 1982; that respondent Gould, Inc., through its Metals Division, operated a secondary lead smelting and refining plant from 1963 to 1982 at 555 Farnam Street, Omaha, at which Biggs worked; that the other defendants, Doctors Fitzgibbons and Lerner, undertook to treat and to monitor the occupational health of the lead workers at the Farnam Street plant; that since 1971 Gould was on notice from OSHA, the National Institute of Occupational Safety and Health, its

workers' compensation carrier CNA, and its own industrial hygiene testing results, of the toxic work environment at the Omaha plant, which was damaging petitioner's bodily systems and would cause premature debility and death; that notwithstanding, the defendants intentionally exposed petitioner to the poisonous atmosphere and deliberately misrepresented the safety of the workplace. Respondent Gould elected not to warn the petitioner to get treatment for the high degree of lead assimilation Gould's own studies revealed.

Instead Gould pretended to the unlettered workers that it was treating them properly. In the face of explicit governmental, industry and medical warnings that deleading drugs were not to be used prophylactically in the workplace so as to lower blood leads (since such drugs were highly toxic especially to the

kidneys and by binding themselves to lead caused the lead to be redistributed to and absorbed by other parts of the body such as the gastrointestinal tract and kidneys), Gould defiantly administered such drugs to the petitioner thus compounding the first poisoning by a second. Thus, Gould, through the plant physician Dr. Fitzgibbons, used the pretext of an ostensible medical surveillance program intentionally to harm the petitioner. By deceit Gould induced petitioner to continue to work in the toxic factory and elected to aggravate and enhance petitioner's disabilities and prevent him from discovering his injuries. Gould intentionally selected as workers minority men of very limited education or experience and deliberately concealed from the workers, including petitioner, that all new employees would be poisoned within

one to three months of exposure; that the drugs (Versenate or Penicillamine) being administered to them were discredited by responsible occupational physicians; and that the blood levels of lead shown by Gould's own testing established that petitioner and his co-workers were being poisoned.

Plaintiffs alleged that Gould knowingly and intentionally exposed the plaintiff to the poisonous atmosphere, deliberately misrepresented the safety of the workplace and that the clothing, devices, and other safety precautions taken, and the medical surveillance and medication, provided to him by the medical doctors and others, would protect plaintiffs from harm from assimilation of substances peculiar to the workplace, Gould knowing at all said times that such representations were false. Gould, by its

intentional false representations and intentional concealment of the truth, and intentional failure to warn the plaintiff of the true nature of the work environment, prevented plaintiff from discovering that he would suffer severe, delayed and progressive bodily disease to his bones, joints, internal organs, digestive tract, glandular systems, and numerous other parts of his body. Gould had received citations from the Occupational Safety and Health Administration (OSHA) about the toxic work environment and violations of regulations pertaining to lead and arsenic air levels and warnings from the National Institute of Occupational Safety and Health (NIOSH) about the hazards associated with de-leading drugs. Gould, however, flaunted these warnings as well as the results of its own industrial hygiene testing and

admonitions by its own workmen's compensation carrier CNA.

Gould stated to the plaintiffs that Versenate (a de-leading agent) would protect them and took advantage of plaintiffs' lack of schooling or knowledge of the nature of the poisons plaintiffs encountered. By so acting, Gould intended to deceive and did deceive the plaintiffs and induced them to trust Gould and to continue to work for Gould in the contaminated workplace.

Gould deliberately and knowingly selected as workers in its leaded environment men of very limited education or experience and with no understanding of the perils presented in the Gould workplace. Gould deliberately concealed that all new employees would be poisoned within one to three months of exposure and that the drugs administered to them were

not a defense against the plant environment nor a cure for its effects but rather were aggravating their lead poisoning to irreversible dimensions.

Gould conspired with its physicians to cause sickness and disability to the plaintiffs and harm them, to conceal the situation from state and local authorities to avoid fines, penalties and a shutdown, as well as to conceal from the plaintiff the baneful health effects of lead and arsenic together with the results of biological monitoring and medical examinations.

When Gould finally closed the plant, it abandoned petitioner without warning him that medical care was necessary. The petitioner is seriously ill at the present time with the sequelae of lead poisoning including renal failure and nephropathy, chronic heavy metal poisoning, bone marrow

dysfunction, hypertension, heavy metal cardiomyopathy, congestive heart failure, heavy metal encephalopathy, peripheral neuropathy, nephropathy, nephrosclerosis, liver dysfunction, all as a direct result of exposure to heavy metals at the Gould, Inc. lead smelting and refining plant.

On July 29, 1987 Gould filed a demurrer. On September 1, 1987 a hearing was held at which, inter alia, plaintiffs raised federal constitutional objections including that of due process. On September 8, 1987 the trial court without opinion sustained Gould's demurrer and dismissed Gould from the action. Subsequently, the court consolidated all the cases for purposes of appeal under Tyree Biggs v. Gould, Inc., Doc. 854, No. 722. Appeals were then filed which were consolidated under No. 87-874 Tyree Biggs v. Gould, Inc. and No. 87-857 Ulysses

Abbott v. Gould, Inc. In his brief (pages i, xii, xiii, xiv, 22, 34, 37), and petition for rehearing (pages vi, viii, ix, x, xi, 8, 11, 12), petitioner Biggs and his co-workers argued that their rights under the due process clause of the Fourteenth Amendment were being violated.

On July 21, 1989 the Supreme Court of Nebraska filed its Opinion sustaining Gould's demurrer on the grounds that the Nebraska Workers' Compensation Court had exclusive jurisdiction in actions arising under the Workers' Compensation Act and that the purposes of the Act would be subverted if actions at law were allowed as a remedy which would necessarily focus on the state of knowledge of the employer rather than whether the injury arose out of and in the course of employment. The court held that the exclusive remedy provided by the Workers' Compensation Act

satisfied the due process requirements of the Fourteenth Amendment in that former workers now have a remedy under the Workers' Compensation Act for all personal injuries proved to have been caused by an occupational disease arising out of and in the course of their employment with Gould, including both the initial effects caused by the work environment and any subsequent exacerbations of the same even if these were caused by Gould's knowing misrepresentations of safety and conspiracy with the plant physician to conceal the workers' already existing occupational diseases and to compound the original lead and arsenic poisoning by administering contraindicated drugs and so intentionally to injure the plaintiffs. (Page 9, Opinion.)

On October 13, 1989, the Supreme Court of Nebraska denied petitioner's motion for rehearing.

ARGUMENT

FROM THE BEGINNING OF WORKERS' COMPENSATION LAWS IN THE EARLY PART OF THIS CENTURY, THIS COURT, ALTHOUGH NEVER FACED WITH THE PRECISE QUESTION WHETHER AN INJURY OR OCCUPATIONAL DISEASE INTENTIONALLY VISITED BY THE EMPLOYER UPON THE EMPLOYEE MAY BE COVERED BY SUCH ACTS CONSISTENT WITH DUE PROCESS, HAS STIPULATED THAT DUE PROCESS REQUIRES THAT SUCH LAWS MAY NOT BE ARBITRARY AND UNREASONABLE FROM THE STANDPOINT OF NATURAL JUSTICE; THAT THE COMPENSATION PROVIDED MUST BE AN ADEQUATE SUBSTITUTE AND PROVIDE A CERTAIN AND SPEEDY REMEDY; THAT THE EMPLOYER HAS AN ABSOLUTE DUTY OF MAKING MODERATE AND DEFINITE COMPENSATION IN MONEY TO EVERY DISABLED EMPLOYEE SO THAT THE EMPLOYEE IS SURE OF DEFINITE AND EASILY ASCERTAINED COMPENSATION.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT. THE SUPREME COURT OF NEBRASKA HAS DECIDED THIS FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT. THE DECISION OF THE NEBRASKA SUPREME COURT IS ABSURD AND CAPRICIOUS IN THAT IT HOLDS THE EMPLOYER MAY INTENTIONALLY POISON AFRICAN AMERICAN FACTORY WORKERS THROUGH MISREPRESENTATIONS, DECEIT AND CONCEALMENT OF THE DEADLY WORK ENVIRONMENT AND THEN ENGAGE IN A MEDICAL CONSPIRACY TO CONCEAL THE EMPLOYEE'S INJURY; AND ADMINISTER A UNIVERSALLY CONTRAINDICATED DRUG TO THE TRUSTING EMPLOYEE. THE NEBRASKA ACT VIOLATES SUBSTANTIVE DUE PROCESS SINCE IT

PERMITS AN EMPLOYER TO IGNORE THE DUE PROCESS MANDATED BY THE WORKERS' ACT OF REPORTING, COMPENSATING AND CURING KNOWN DISABILITY YET CLAIM COMMON LAW IMMUNITY IF PERCHANCE IT IS CAUGHT. IN ESSENCE, THE NEBRASKA COURT HAS SANCTIONED A PERVERSION OF THE WORKERS' COMPENSATION ACT STATING THAT AN EMPLOYER IS FREE TO EVADE ITS RESPONSIBILITIES TO THE EMPLOYEE AND INTENTIONALLY TO HARM THE EMPLOYEE BY TAKING ADVANTAGE OF THE PLANT MEDICAL EXAMINATIONS TO CONCEAL AND FURTHER INJURE THE EMPLOYEE WHICH OCCASION IT WOULD NOT OTHERWISE HAVE APART FROM THE WORKERS' COMPENSATION ACT.

A. HISTORICAL PERSPECTIVE

THE EARLY WORKMEN'S COMPENSATION ACTS WHOSE CONSTITUTIONALITY WAS APPROVED BY THIS COURT IN THE 1917 TRILOGY OF WHITE, HAWKINS, AND MOUNTAIN TIMBER, 243 U.S. 188, 210, 219; MIDDLETON, 249 U.S. 152 (1919) AND ARIZONA EMPLOYERS (1919) EXPLICITLY ADDRESSED ONLY ACCIDENTAL AND NOT INTENTIONAL INJURIES.

Special laws providing for compensation in the event of employment accidents have been in existence for slightly over a century. The first country to adopt a comprehensive system of accident compensation on a national scale

was Germany in 1884. Great Britain enacted its legislation in 1897.

The first State Workmen's Compensation law, that of New York State, enacted in 1910 (N.Y. Session Laws 1910, ch. 674) was declared unconstitutional in March 1911 in Ives v. South Buffalo Railroad, 201 N.Y. 271, 94 N.E. 431 (1911) on the grounds that the employer was deprived of his property without due process by being held liable for an injury not caused by his fault or negligence.

In 1911 ten other states passed acts. Of these, nine states, attempted to circumvent the Ives decision by adopting non-compulsory laws which permitted employers to elect. New Jersey was the first to adopt the elective type of law.

> Had the New York court supported the compulsory law it is probable that little would have been heard of the "elective" idea...The shadow of constitutionality hung over the

> movement until 1917 when in three separate decisions the United States Supreme Court affirmed the constitutionality of the three prevailing types of laws: New York's 1913 compulsory law (N.Y. Central R.R. Co. v. White, 243 U.S. 188), Iowa's elective law (Hawkins v. Bleakley, 243 U.S. 210) and Washington's law which included an exclusive state insurance fund (Mountain Timber Co. v. Washington, 243 U.S. 219).

Somers & Somers, Workmen's Compensation (New York: Wiley, 1954), p. 33. Thus, as noted in 1972 in The Report of the National Commission on State Workmen's Compensation Laws (Washington, July 1972), p. 35:

> A description of the origin of workmen's compensation, including the vestigial constitutional inhibitions, serves a larger purpose than homage to history. The basic principles of the present program are largely those established 50 or 60 years ago; they can be completely understood only in the context of forces present at their creation.

The Workmen's Compensation Act of 1913 of Nebraska was approved on April 21,

1913 (General Laws, Chapter 198, pp. 578-603). In pertinent parts, it provided:

Part I

Section 1. When personal injury is caused to an employee by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer...

Section 2. In all cases brought under Part I of this act it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was willful, or that the employee was in a state of intoxication; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee had assumed the risks inherent in, or incidental to, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances.

Part II

Section 9. If both employer and employee become subject to Part II of this act, both shall be bound by the schedule of compensation herein provided, which compensation shall be paid in every case of injury or death caused by accident arising out of and in the course of employment...

> Section 10. When employer and employee shall by agreement, express or implied, or otherwise as hereinafter provided, accept the provisions of Part II of this act, compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment, without regard to the negligence of the employer...
>
> Section 11. Such agreement or the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in Part II of this act... [Emphasis added.]

The original Nebraska Act was thus both an Employer's Liability and Compensation Act. It was of the elective type, and did not abrogate the common law action, which alone would lay for occupational diseases and employers or employees not covered by or electing under the Act. The Act addressed itself to accidents and employer negligence. It was also a rehabilitative Act, imposing,

in addition to compensation, the responsibility for medical and hospital services and medicines (Section 20).

The Nebraska Act became effective only on December 1, 1914 at Governor Morehead's proclamation after the referendum of November, 1914.

At the time of the passage of the Workmen's Compensation Acts, the difference between acts of negligence and intentional acts was well understood. Thus, the court in Hankins v. Reemers, 86 Neb. 307, 125 N.W. 516 (1910) observed:

> A person guilty of negligence ordinarily does not anticipate the consequences of his acts or intend that anyone shall be injured by what he has done or omitted to do.

The words "negligence" and "intentional" were deemed contradictory. Gibeline v. Smith, 160 Mo. App. 545, 80 S.W. 961 (1904). "If the act complained of is intentional, the question of

negligence does not arise. If the act is intentional, it becomes fraudulent or criminal, or it may be a trespass." Raning v. Metropolitan Street Railway Co., 157 Mo. 477, 57 S.W. 268 (1900).

Given that the distinction between intentional and accidental or negligent was clearly appreciated, it cannot be seriously maintained that the Nebraska legislature or those other legislatures also tracking the New Jersey Act intended to subsume an employer's intentional injuries under the Workmen's Compensation Act. Otherwise, they clearly would have omitted the antonym's "accident" and "negligence" from the statute.

Beginning in 1825 and especially after Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), torts were divided into two broad categories, namely, intentional torts and negligence, in which forms they

subsequently evolved. See Professor E.F. Roberts, Blackstone to Shaw to ?, An Intellectual Escapade in a Tory Vein, 50 Cornell L.Q. 191-216 (1965), pp. 191, 200, 202.

In England, the matrix of the movement, the employee was not restricted to compensation for intentional injuries but an option was given to sue: "when the injury was caused by the personal negligence or willful act of the employer or of some person for whose act or default the employer is responsible...the workman may, at his option, either claim compensation under this act or take proceedings independently of this act" (6 Edw. VII, c. 58). Thus, in Blake v. Head (1912), 106 L.T. Rep. 822, 5 B.W.C.C. 303, on the virtual eve of the Nebraska and other acts, it had been held that a willful assault with a hatchet by an

employer upon his errand boy was not an accidental injury and thus was noncompensable since it was an intentional felonious act.

In 1914, the Conference of Commissioners of Uniform State Laws published a Uniform Workmen's Compensation Act which explicitly stated that the words "by accident" were added by design to permit the employee to recover "full damages" for the "assault or willful intention of employer" and referred to the New Hampshire, New Jersey (1911), Arizona, Rhode Island (1912), California, Illinois, Kansas, Minnesota, Nebraska, Oregon, Wisconsin (1913), Maryland and New York laws (1914) in this light.

During this period of the first Compensation Acts, the various state courts laboring to dispel the shadow of unconstitutionality consistently pointed

out that the acts did not deal with intentional wrongs, but only with accidental injuries, to rebut employees' contentions that the Acts were unconstitutional in violation of those provisions of State Constitutions ensuring redress in the courts for wrongs inflicted.

In State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 97 N.E. 602 (1912), in reply to the objection that the employee had been denied his Constitutional right to remedy under Article 1, Section 16 of the Constitution of Ohio, it was observed:

> Therefore the only right of action which this statute removes from the employee is the right to sue for mere negligence (which is not willful or statutory) of his employer, and it is within common knowledge that this has become in actual practice a most unsubstantial thing. (Id., 97 N.E. at 605).
>
> ...a right of action being withdrawn by the legislature, which experience has shown to be difficult of

> practical enforcement, while preserving the valuable and substantial kindred rights of action, it cannot be said that in such withdrawal there is a violation of the Constitution in the respects claimed. (Id., 97 N.E. at 607).

Of particular interest for us is the opinion in Adams v. Iten Biscuit Co., 63 Okla. 52, 162 P. 938, 945 (1917), cited with approval and described at length by the Supreme Court of Nebraska in Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N.W. 659 (1922). In Adams, it was argued that the Oklahoma Compensation Act was unconstitutional because, inter alia, the employee was deprived of the equal protection of the laws in that he could not recover thereunder for willful injury. The court replied at 162 P. 945:

> The act does not undertake to regulate willful injuries of the character mentioned, but leaves the injured employee to his remedy as it existed when the act was passed.

> ...A willful or intentional injury, whether inflicted by the employer or employee, could not be considered as accidental, and therefore is not covered by the act.

Interestingly, the New York Court of Appeals also held in Jensen v. Southern Pacific Co., 215 N.Y. 514, 109 N.E. 600 (1915) that New York's revised Compensation Act dealt only with accidental injuries and not intentional wrongs, before the famous reversal on other maritime grounds at 244 U.S. 205, 37 S.Ct. 524, 526, 61 L.Ed. 1086 (1917):

> A point was made on oral argument that the act was unconstitutional for depriving an employee injured by negligence imputable to the employer of a right of action for the wrong...It is not accurate to say that the employer is deprived of all remedy for a wrongful injury. He is given a remedy...which is prompt, certain and inexpensive...Moreover, the act does not deal with intentional wrongs but only with accidental injuries.

A survey of the decisions on point thus indicates that the early Acts were

tolerated only because they replaced the worker's insubstantial rights under mere negligence, which were in reality non-existent because of the unholy trinity of defenses. The Acts addressed themselves to the inevitable accidents of the workplace and not to intentional wrongs. The early Acts were eleemosynary in intent, to give the injured worker something to which he was not entitled; there was no intention to take valuable rights from the employee that were protected by the Constitution.

Despite the attempts of the present Nebraska Supreme Court at rationalization, the court's decision in Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N.W. 659 (1922), reh'g den., 193 N.W. 768 (1923) clearly reflected the national assumption that intentional torts were not covered

under the Workmen's Compensation Acts.

The Navracel court explicitly stated:

> An employer could not, of course, be protected by the provisions of the Compensation Act where he intentionally inflicts an injury upon an employee. Such an injury could hardly be said to be one which would be incidental to the employment, or one which would arise from the operation of the employer's business.

B. DESIRABILITY OF CERTIORARI

THAT MOMENT HERALDED IN MOUNTAIN TIMBER CO. v. STATE OF WASHINGTON, 243 U.S. 219 (1917) WHEN THE DUE PROCESS PARAMETERS OF WORKMEN'S COMPENSATION WOULD BE EXAMINED HAS ARRIVED GIVEN THE PERVASIVE NATIONWIDE LITIGATION WHETHER WORKERS' COMPENSATION ACTS INCLUDE INTENTIONAL INJURIES.

THE ISSUE OF THE EMPLOYER'S ALLEGED PREROGATIVE INTENTIONALLY TO INJURE THE EMPLOYEE GOES TO THE HEART OF AMERICAN JURISPRUDENCE. THE NEBRASKA WORKERS' COMPENSATION ACT VIOLATES SUBSTANTIVE DUE PROCESS SINCE IT PERMITS AN EMPLOYER WITH IMPUNITY TO PERVERT THE ACT BY TAKING THE OCCASION OF EMPLOYEE PHYSICAL EXAMINATIONS TO CONCEAL OCCUPATIONAL DISEASES ALREADY CONTRACTED AND TO INJURE THE TRUSTING EMPLOYEE FURTHER BY ADMINISTERING A UNIVERSALLY CONTRAINDICATED DRUG THAT WILL ARTIFICIALLY REDUCE BLOOD LEAD LEVELS BY REDISTRIBUTING THE LEAD TO OTHER PARTS OF THE BODY.

A certain myopia characterizes the literature on the exclusivity provision. For, as noted, in The Report of the National Commission on State Workmen's Compensation Laws (Washington, July, 1972), p. 77, "An objective of workmen's compensation as important as income maintenance is delivery of medical care and rehabilitation services for work-related injuries or diseases." Thus, any interpretation of the exclusivity provision, that would ignore the rehabilitative goal of the Act and permit a perversion of the same, must be disavowed.

The following sections of the Nebraska Act simply cannot be ignored:

> Neb. Rev. Stat. 48-120 (Reissue 1984):
>
> The employer shall be liable for all reasonable medical, surgical, and hospital services...and medicine as and when needed, which are required

by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.

Neb. Rev. Stat. 48-144.01 (Reissue 1984):

In every case of reportable injury occurring in the course of employment, the employer or insurance carrier shall file a report thereof with the compensation court.

Petitioner has alleged that Gould concealed from him the results of biological monitoring and medical examination and by the unethical administration of contraindicated drugs Gould aggravated and gravely enhanced plaintiff's sickness and concealed disability.

To this complaint, Gould has demurred. In essence, Gould argues that the Workers' Compensation Act permitted it to continue to poison the plaintiff with impunity despite the clear warnings it had received since 1971 about the toxic work

environment of the Omaha plant. Gould also contends that somehow the Act also immunizes its conscious decision to defy industry, medical and governmental admonitions not to engage in prophylactic chelation of lead workers leading to renal impairment. Gould makes the incredible argument that, after it has purposely violated every possible provision of the Workers' Compensation Act by scheming not to compensate petitioner and not to report his illness to the state authorities, it is protected by the Act now that it has been caught in violation of the Act--this even though it effected its scheme by perverting the Act and engendering in the trusting workers through the fraud of the white coat confidence in the ostensible medical services provided that were actually used to compound the first

occupational poisoning by a second organic poisoning.

In essence, the Nebraska Supreme Court's decision of July 21, 1989 espouses this absurdity and agrees with the fiendish designs of Gould since the Court's decision ineluctably advises that an employer may with impunity refuse to treat, compensate and report known disability of an employee. In addition, the employer may use the pretext of medical examinations under the Workers' Compensation Act to misrepresent to an employee that his health is fine and administer a contraindicated drug that will ruin his kidneys. The Nebraska Court holds that the employer if ever caught is protected by the Compensation Act he has hitherto avoided and perverted. The court thus gives a judicial imprimatur to immoral conduct.

The Nebraska Court's encouragement to employers to disregard the Workers' Compensation Act and poison for profit denies to the employee his right to a remedy. Under such circumstances, so long as the employer has his way, the employee has been denied a remedy for the initial poisoning in the workplace which the employer chose not to report, treat and compensate; he has also been denied a remedy for the employer's intentional aggravation of a disease that otherwise could have been treated before its effects became irreversible.

Prior to the decision of the Nebraska Supreme Court on July 21, 1989 in this case, courts had uniformly allowed an independent common law action to lie that alleged a medical conspiracy. Delamotte v. Unicast Div. of Midland Ross Corp., 64 Ohio App. 2d 159, 18 Ohio Ops. 3d 117, 411

N.E.2d 814 (1978) (concealment of pneumoconiosis condition over 15 year period of x-rays); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 506 (1985) (fraudulently concealing specific medical information obtained during employee physical examinations that reveal diseases already contracted); Sterry v. Bethlehem Steel Corp., 64 Md. App. 175, 494 A.2d 748 (1985) (employer intentionally narcotized employee to cover up disc pathology).

Gould refused to install proper engineering controls in the plant; it elected to poison the petitioner and his co-workers. After it confirmed by its own tests that it had indeed poisoned the petitioner, it did not pay him compensation but elected not to report the disability. No other court has ever held that the exclusivity provision immunizes

an employer who avoids his responsibilities under the Compensation Act and goes so far as to engage in a medical conspiracy to harm the employee. Rather the whole purpose in passing the Acts was to cure and compensate the employee promptly.

The early history of the workmen's compensation acts was substantially impacted by constitutional doubts and fears. The shadow of unconstitutionality hung over the early Acts from two perspectives. From the employer's, he would be deprived of his property without due process unless an elective provision were added. From the employee's, his right of access to the courts and due process was not being violated since the only right of action removed was that of mere negligence which in practice was insubstantial whereas he retained the

right to resort to the courts for the redress of any intentional injury.

The context in which this Court decided the constitutionality of the early Acts was in the legislative assumption that such Acts covered only accidental injuries. Thus, in the very first State Workmen's Compensation Act decided by this Court, Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 35 S.Ct. 167, 59 L.Ed. 364 (1915), this Court held that the Ohio plan did not offend equal protection when it deprived only manufacturing companies employing five or more employees of the unholy trinity of defenses if they did not elect to be covered by workers' compensation. This Court described the Ohio Act thus:

> The employer who complies with the law is relieved from liability for injury or death of an employe who has complied with the terms of the act, except the injury arise from the wilful act of the employer, his officer or agent, or from failure to

> comply with laws enacted for protection of the employe, in which event the injured may sue for damages or recover under the act.

In New York Central R.R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917), this Court approved the compulsory Workers' Compensation Law of New York State but cautioned that the employee's due process rights could not be totally ignored, and that it was not saying any scale of compensation, howsoever insignificant, would be supportable and stressed that the new arrangement could not be arbitrary and unreasonable from the standpoint of natural justice. The Court referred to Constitutional concerns "that the employee's rights were interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the

damages actually sustained, and is limited to the measure of compensation prescribed by the act". In this context, the Court advised:

> Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute.
>
> It perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.
>
> If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages.
>
> We cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice.

> Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest...a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation.
>
> It cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee...in lieu of the common-law liability confined to cases of negligence.
>
> This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable.

In Mountain Timber Co. v. State of Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), decided the same day, this Court approved the compulsory state insurance fund of Washington, Session Laws, 1911, Chapter 74, pp. 345-371. This Court repeated its caution about the scale of compensation and stressed that its approval was only with reference to those

injuries in employment that have become "frequent and inevitable" and the "means of distributing the risk and burden of losses that inevitably must occur." In fact, the prologue of the Washington Act recited that "the remedy of the workman has been uncertain, slow and inadequate" and that "sure and certain relief for workmen...is hereby provided." This Court's opinion referred to Section 6 of the Washington Act giving the employee the privilege to take under the act and also have a cause of action against the employer for any excess if injury or death results to the workman from the employer's deliberate intention.

The Court again cautioned there were due process outer limits to be addressed another day:

> The plan of assessment insurance is closely followed, and none more just has been suggested as a means of

distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

* * *

Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur.

In White, it is pointed out that...the states are not prevented by the Fourteenth Amendment, while relieving employers from liability for damages measured by common-law standards and payable in cases where they or others for whose conduct they are answerable are found to be at fault, from requiring them to contribute reasonable amounts and according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries to their employees, irrespective of the question of negligence.

With respect to the scale of compensation, we repeat what we have said in New York Central R.R. Co. v. White that in sustaining the law we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises.

In Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (1916), aff'd, 249 U.S. 152, 39 S.Ct. 227, 63 L.Ed. 527 (1919), the Supreme Court affirmed the decision of the Supreme Court of Texas, indicating that the Workmen's Compensation Act could not take away the employee's right to sue for intentional injuries.[1] In affirming, this Court

---

[1] This being the operation of the Act upon employers and employees, the question that commands first attention in the consideration of its constitutionality is, Does it violate any of their fundamental rights?...

Here the character of injuries, or wrongs, dealt with by the At becomes important. Notwithstanding the breadth of some of its terms, its evident purpose was to confine its operation to only accidental injuries, and its scope is to be so limited.

...It is therefore not to be doubted that the Legislature is

sustained against equal protection challenges the Texas Act's inclusion of only those employers with five employees as in Jeffrey Mfg. Co., supra. It also made reference to the provision that "the employee...shall have no cause of action

---

> without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another. Such a cause of action may be said to be protected by the Constitution and could not be taken away; nor could the use of the courts for its enforcement be destroyed. This Act does not affect the right of redress for that class of wrongs.
>
> ...It is its abrogation of a familiar rule of liability that affords the chief challenge of its validity and not unnaturally prompts the test of the Constitution...The right to have the liability of an employer for an accidental injury to an employee determined by a common law doctrine is not a constitutional immunity, and this Act in changing that rule of liability therefore invades no constitutional right.

against the employer for damages except where a death is caused by the willful act or omission or gross negligence of the employer."

In Arizona Employers' Liability Cases, 250 U.S. 400, 39 S.Ct. 553, 63 L.Ed. 1058 (1919), this Court again referred to considerations of natural justice and restricted itself to inevitable injuries:

> They (rules of law) are not placed, by the Fourteenth Amendment beyond the reach of the State's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably and in defiance of natural justice with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.
>
> Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured

> but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries,...
>
> The State of Arizona reasonably might say: "the probability of injury occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wage."

In Truax v. Corrigan, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921), this Court struck down as violative of due process a state law exempting ex-employees from restraint by injunction. This Court held that a remedy should lie for an intentional injury to a fundamental right of liberty and property.

In Ward & Gow v. Krinsky, 259 U.S. 503, 42 S.Ct. 529, 66 L.Ed. 1033 (1922), this Court approved the extension of the New York Act to all employments in which

four or more workmen were employed. It upheld the law only because:

> In general, as in the New York law, provisions for compulsory compensation are made to apply only to those employed in hazardous occupations, where it may be contemplated by both parties in advance that sooner or later some of those employed probably will sustain accidental injury in the course of the employment but where nobody can know in advance which particular employees or how many will be the victims, or how serious will be the injuries.

More recently, this Court in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), in rejecting a due process objection and approving the Price-Anderson Acts imposing a limitation on liability for nuclear accidents from the operation of private nuclear power plants, referred to the guidelines laid down in New York Central R.R. Co. that compensation must be "reasonable, prompt

and equitable" and laid stress on the "panoply of remedies and guarantees" under the Price-Anderson Act:

> New York Central R.R. Co. v. White, 243 U.S. at 201 observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "He is entitled to moderate compensation."
>
> The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident it also guarantees a level of net compensation generally exceeding that recoverable in private litigation.

State courts also have cited New York Central R.R. Co. v. White, supra, for the proposition that, although the rule of negligence may be abrogated, a remedy must be left for intentional injury. Gallegher v. Davis, 183 A. 620 (Del. Super. 1936) (upholding guest statute permitting recovery only for intentional injuries).

The purposes and strictures on federal compensation acts have otherwise been described as to "provide an injured employee with certain and absolute benefits in lieu of possible common law benefits obtainable only in tort actions against his employer," Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977, LHWCA); "to provide quick, certain, relief for work-related injuries," Martin v. United States, 566 F.2d 895 (4th Cir. 1977); "to give injured workers a quicker and more certain recovery," Wallace v. United States, 669 F.2d 947 (4th Cir. 1982, FECA).

By analogy, under the Longshoremen Harbor Workers Compensation Act, there are two exceptions to the exclusivity provision: the first statutory at 33 U.S.C. 905(a) where an employer has failed to pay compensation; the second judicially

created where the employee's injury was the result of an intentional tort by his employer. Houston v. Bechtel Associates, 522 F.Supp. 1094 (D.D.C. 1981); Austin v. Johns-Manville Sales Corp., 508 F.Supp. 313 (D. Md. 1981).

As noted in Illinois Psychological Association v. Falk, 818 F.2d 1337 (7th Cir. 1987), the durable oxymoron of "substantive due process" allows persons harmed by state regulation to complain that the regulation is so unreasonable a deprivation of life, liberty or property that it is unconstitutional even if adopted and applied in conformity with the most rigorous procedural safeguards, so that no denial of due process of law in the usual sense can be shown.

From the standpoint of natural justice, delayed workers' compensation benefits are insufficient when an employer

has withheld knowledge of thanatognomic symptoms from an employee and elected to cause irreversible damage to the major organs of the employee's body. Under our scenario, there has been no prompt and equitable payment to the employee. Rather, the original payment for the disabling condition was withheld and the employee' condition aggravated. If the employee was already disabled and should have been receiving compensation all along, he receives nothing for the original injuries since he was kept at work and received wages. Nor does he receive commensurate compensation for the enhancement of injuries. That the employee has a remedy to recover compensation now that the employer's cover-up has been discovered is not the prompt, reasonable and equitable mechanism of compensation required by due process.

In fact, when one is the victim of an intentional physical injury, due process seems to mandate that he have the right to full recovery.

The exclusivity provision should not shield an employer who has refused to pay known disability but, by concealing same, has violated its reporting and rehabilitative obligations and caused a second injury of irreversible dimensions to the worker.

Gould elected not to compensate known disability but to evade the Workers' Compensation Act. Gould elected to poison unlettered human beings who were minority workers.

The Nebraska court has also held that an employer may poison an employee by a deadly work environment, and may engage in misrepresentation, deceit, fraud and conspiracy with plant physicians to

conceal the illness already contracted and then administer drugs in an unethical fashion to further poison and, when the employee leaves work, the employer has no post-employment obligation to inform and treat the workers. An employer's failure to advise and treat former employees of illnesses should be actionable at law since it is a new injury. This aggravation of plaintiffs' injuries certainly did not arise in the course of employment.

In the early part of this century, it was necessary for this Supreme Court to decide in the famous trilogy and other cases supra the constitutionality of the various types of State Workers' Compensation Acts. As the century draws to a close, it is desirable that the Court step in to clarify whether a State may under the Federal Constitution have a

statute that permits an employer to evade the due process of speedily curing and compensating an employee and instead intentionally to injure the employee. The advance sheets indicate that the question is being litigated in virtually every court of our land.

As noted in Barth v. Firestone Tire and Rubber Co., 661 F.Supp. 193 (N.D. Cal. 1987):

> The Court must state, preliminarily, that this case presents troubling and serious questions that go to the very heart of American jurisprudence. It presents no questions that are susceptible to easy answers, and the plaintiff describes a tragic fact situation.
>
> Firestone fraudulently concealed the information and the danger from its workers. It allegedly disguised the use of the hazardous substances, denied that it was using these toxic substances and intentionally misinformed its employees about the safety and identity of the substances. Firestone intentionally misrepresented to its workers that there were none of the hazardous substances present in the work place

and that no safety precautions were needed.

Firestone exposed 5,000 employees to toxic substances without their consent.

As noted in the concurring opinion in Blankenship v. Cincinnati Milacion Chemicals, Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) (sustaining an action for intentional injury against the employer):

> The decision in this case... establishes that this court has not yet reached a state of institutionalized impotence...
>
> A decision other than that we reach today...would be a display of judicial anemia and necrosis. All law is justice, and justice is law. It is the adoption and promotion of what is good, and the avoidance of evil...
>
> The view expressed to support employer immunity is generated by greed to save a few dollars at the expense of chemically poisoned employees. It displays a brutal lack of compassion. It sends a message that dollars saved is more important than workers' lives.

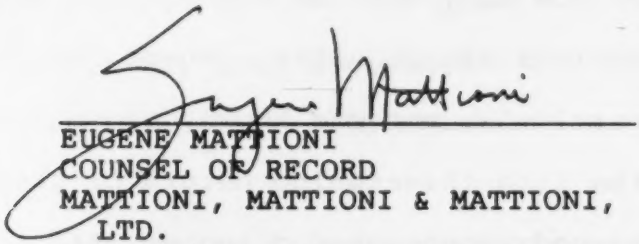
The Nebraska Court has held that, if successful, an employer may by misrepresentation, concealment, deceit, fraud and conspiracy with the plant physician poison, drug and abandon an employee with impunity. This is not America.

The exclusivity provision should not be allowed to immunize and shelter murder, felonious assault or the infliction of deadly physical force or serious bodily injury.

It is submitted that the "another day" when the outer limits of due process attending Workers' Compensation Acts is to be considered, reserved by this Court in Mountain Timber Co. (1917) has arrived. In fact, these outer limits were adumbrated in the Arizona Employers' Liability Cases and Ward & Gow, supra; namely, that workers' compensation acts

can be justified only for the inevitable accidents of the workplace whereby nobody can know in advance which particular men or how many will be the victims or how serious the injuries. Where the particular men are known, their number and the life-threatening nature of their already contracted diseases, and the employer elects to conceal the injuries and to aggravate same, and to evade the compensation due, substantive due process is violated if the employer may claim the benefit of the exclusivity provision of conspiracy is ever uncovered. As noted in Truax, supra, a remedy should lie for an intentional injury to a fundamental right of liberty and property. Although it is difficult to describe precisely every interest protected by substantive due process, "it can hardly be doubted that chief among them is the right to some

degree of bodily integrity." White v. Rochford, 592 F.2d 381 (7th Cir. 1979). The petition for certiorari should be granted.



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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 1989, three copies each of the Petition for the Writ of Certiorari of petitioner Tyree Biggs have been served on Joseph K. Meusey, Esquire, 500 Electric Building, Omaha, NE 68102, attorney for respondent Gould, Inc. and the Attorney General of the State of Nebraska by depositing said copies in the United States Mail, first-class postage prepaid.

I also certify that I am a member in good standing of the bar of the United States Supreme Court.

Eugene Mattioni

EUGENE MATTIONI

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Filed July 21, 1989

(Nos. 87-857, 87-874)

Ulysses Abbott, Appellant

v.

Gould, Inc., Appellee

Tyree Biggs, et al., Appellants

v.

Gould, Inc., Appellee

Case Caption

Abbott v. Gould, Inc.

Appeal from the District Court for Douglas County: Paul J. Hickman, Judge.

Affirmed.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, J.J., and WITTHOFF, D.J.

SYLLABUS

1. Workers' Compensation: Jurisdiction. The Nebraska Workers'

Compensation Court has exclusive jurisdiction in actions arising under the Workers' Compensation Act.

2. Jurisdiction: Words and Phrases. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.

3. Judgments. The language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts.

4. Constitutional Law. The conduct proscribed by U.S. Const. amend. XIII and Neb. Const. art. I, § 2, is the use or threat of physical force or legal coercion to extract labor from an unwilling worker.

5. Constitutional Law: Workers' Compensation: Due Process. The exclusive remedy provided by the Workers' Compensation Act satisfies the due process

requirements of U.S. Const. amend. XIV and Neb. Const. art. I, § 3, as well as the requirements of Neb. Const. art. I, § 13, that every person shall have a remedy by due course of law for any injury done him or her.

CAPORALE, J.

In these consolidated appeals the plaintiffs-appellants, a number of former employees and personal representatives of certain former employees of defendant-appellee, Gould, Inc., seek to recover damages allegedly caused by the employer's conduct and that of its contract physician, defendant Robert J. Fitzgibbons, Sr., M.D. Gould demurred in part on the ground that the district court lacks subject matter jurisdiction. That court sustained Gould's demurrers and dismissed the actions as against it, which

dismissal the plaintiffs assign as error. We affirm.

Pursuant to the district court's novel "Standing Order," the propriety of which does not now concern us, the various plaintiffs filed a "Master Long Form Petition," setting forth common allegations of fact. In addition, each plaintiff filed a "Short Form Petition," setting forth allegations of fact unique to each.

So far as is relevant to these appeals, the petitions allege that at the relevant times, Gould operated a secondary lead smelting and refining plant; that Gould knowingly misrepresented to plaintiffs that their work environment was reasonably safe and that the clothing and devices provided them and safety precautions taken would protect them from harm; that, in fact, Gould intentionally

subjected plaintiffs to contact with and ingestion of various airborne particles and fumes known to Gould to be injurious to human health; that Gould exacerbated plaintiffs' work hazards by intentionally failing to provide adequate safeguards at the worksite and by intentionally refusing to disclose the true hazardous character of the work environment; that in an attempt to cover up the effects of the toxic exposures, Gould falsely and intentionally misrepresented that certain drugs and medications would prevent the harmful effects of whatever substances might be present in plaintiffs' work environment; that, as intended by Gould, plaintiffs relied upon the employer's misrepresentations and were thereby caused to ingest, without their informed consent, certain drugs and medications which independently caused them additional

injury; and that Gould accomplished the foregoing in conspiracy with its contract physician.

The Nebraska Workers' Compensation Court has exclusive jurisdiction in actions arising under the Workers' Compensation Act. Peak v. Bosse, 202 Neb. 1, 272 N.W.2d 750 (1978). See, als9, Haumont v. City of Lincoln, 229 Neb. 52, 424 N.W.2d 892 (1988); P.A.M. v. Quad L. Assocs., 221 Neb. 642, 380 N.W.2d 243 (1986). Our question becomes, then, whether plaintiffs' petitions state causes of action under the act. If so, exclusive jurisdiction lies in the compensation court, and the district court properly granted Gould's demurrers for want of subject matter jurisdiction, such jurisdiction being the power to hear and determine cases of the general class to which the proceedings in question belong.

State v. Gorman, ante p. 738, ___ N.W.2d ___ (1989); In re Interest of Adams, 230 Neb. 109, 430 N.W.2d 295 (1988).

Neb. Rev. Stat. §48-101 (Reissue 1988) provides, so far as pertinent to our inquiry, for workers' compensation benefits when an employee suffers personal injury caused by an occupational disease which arises out of and in the course of his or her employment.

> An occupational disease must be a natural incident of a particular occupation and must attach to that occupation a hazard which distinguishes it from the usual run of occupations and which is in excess of that attending employment in general. . . .
>
> . . . .
>
> The requirement of [§48-151] is that the cause and conditions of the disease be characteristic of and peculiar to the employment and that the disease be other than an ordinary disease of life. The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must

> result in a hazard which distinguishes it in character from employment generally.

Ritter v. Hawkeye-Security Ins. Co., 178 Neb. 792, 794-95, 135 N.W.2d 470, 472 (1965). Plaintiffs argue, in effect, that Gould's acts elevated the hazards to which they were exposed to a point well beyond that "natural[ly] incident" to the occupation of lead smelting and that their injuries thus are not within the comprehension of "occupational disease" as that term is used in the Workers' Compensation Act.

In Marlow v. Maple Manor Apartments, 193 Neb. 654, 659, 228 N.W.2d 303, 306 (1975), this court held that the Workers' Compensation Act is

> intended to cover only claims arising out of and in the course of the employment. The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be

> payable, the [Workers'] Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act. An adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the [Workers'] Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists.

More recently, in P.A.M. v. Quad L. Assoc., supra at 645, 380 N.W.2d at 246, quoting Marlow v. Maple Manor Apartments, supra, and Johnston v. State, 219 Neb. 457, 364 N.W.2d 1 (1985), it was observed:

> "The [Workers'] Compensation Act provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment. This is the basis on which the rights of employers and employees are put in balance. The employer, by having liability imposed on him without fault, receives in return relief from tort actions. Logically, therefore, where the employer is negligent he should not be relieved of liability

> where compensation coverage is not provided to the employee.
>
> ". . . .
>
> ". . . The operative fact is one of coverage, not of election to file for compensation. If coverage exists, even though for some reason compensation may not be payable, the [Workers'] Compensation ct is <u>exclusive</u>."

(Emphasis in original.)

This court has never before faced the precise question presented in this appeal: whether allegations that an employer intentionally concealed the dangers inherent in the work environment, intentionally inflicted injury resulting in occupational disease, and intentionally concealed the true nature and effect of the disease fall within or without the Workers' Compensation Act. However, the question is not without precedent.

In a case remarkably similar to those now before us, the injured employees

alleged that their employer had intentionally concealed from them and from various state and federal agencies the fact of their continuing exposure to toxic chemicals and that they had been injured as a result. The Supreme Court of Ohio held that the risk of intentional tort committed by the employer was not one "'"in the course of or arising out of [the employee's] employment.". . .'" Blankenship v. Chemicals, 69 Ohio St. 2d 608, 613, 433 N.E.2d 572, 576 (1982). The majority of that court reasoned that to hold otherwise would be tantamount to encouraging such conduct, a consequence which could not be reconciled with one of the purposes of the Workers' Compensation Act, namely, the promotion of a safe and injury-free work environment.

The Supreme Court of California reasoned differently in Johns-Manville,

etc. v. Contra Costa, etc., 27 Cal.3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980). That court focused on the balance the Workers' Compensation Act achieves by poising the advantage of an employer's freedom from common-law liability against the detriment of relatively swift and certain compensation liability, while giving the employee expeditious compensation benefits in return for the surrender of a potentially larger recovery at common law. The Johns-Manville court wrote:

> It is not uncommon for an employer to "put his mind" to the existence of a danger to an employee and nevertheless fail to take corrective action. . . . In many of these cases, the employer does not warn the employee of the risk. Such conduct may be characterized as intentional or even deceitful. Yet if an action at law were allowed as a remedy, many cases cognizable under workers' compensation would also be prosecuted outside that system. The focus of the inquiry in a case involving work-related injury would often be

> not whether the injury arose out of and in the course of employment, but the state of knowledge of the employer and the employee regarding the dangerous condition which caused the injury. Such a result would undermine the underlying premise upon which the workers' compensation system is based. That system balances the advantage to the employer of immunity from liability at law against the detriment of relatively swift and certain compensation payments. Conversely, while the employee receives expeditious compensation, he surrenders his right to a potentially larger recovery in a common law action for the negligence or willful misconduct of his employer. This balance would be significantly disturbed if we were to hold, as plaintiff urges, that any misconduct of an employer which may be characterized as intentional warrants an action at law for damages.

Id. at 474, 612 P.2d at 953-54, 165 Cal. Rptr. at 863. Thus, the majority of the court held that California's compensation act barred an action at law for the initial injury the employee suffered as the result of being exposed to asbestos at his work site. The Johns-Manville opinion

went on to hold, however, that an action at law is available to the injured employee

> if the employer acts deliberately for the purpose of injuring the employee or if the harm resulting from the intentional misconduct consists of aggravation of an initial work-related injury. . . .
>
> In the present case, plaintiff alleges that defendant fraudulently concealed from him, and from doctors retained to treat him, as well as from the state, that he was suffering from a disease caused by ingestion of asbestos, thereby preventing him from receiving treatment for the disease and inducing him to continue to work under hazardous conditions. These allegations are sufficient to state a cause of action for aggravation of the disease, as distinct from the hazards of the employment which caused him to contract to the disease.

Id. at 476-77, 612 P.2d at 955, 165 Cal. Rptr. at 865. In a similar vein, the Supreme Court of New Jersey, in Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985), held that claims that the employer knowingly and

deliberately exposed its employees to the adverse health effects of asbestos did not state a cause of action outside the workers' compensation law, but that the claim the employer fraudulently concealed its knowledge of already contracted diseases did state such a cause of action.

The foregoing analyses and others like them, however, fail to accord due deference to the fact that "[t]he primary object of compensation acts was to do away with the inadequacies and defects of the common-law remedies, to destroy the common-law defenses, and, in the employments affected, to give compensation, regardless of the fault of the employer." (Emphasis supplied.) Ray v. School District of Lincoln, 105 Neb. 456, 462, 181 N.W. 140, 142 (1920).

Plaintiffs' reliance upon Navracel v. Cudahy Packing Co., 109 Neb. 506, 191 N.W.

659 (1922), reh'g denied 109 Neb. 512, 193 N.W. 768 (1923), for the proposition that this court has since adopted an intentional tort exception to the compensation act is misplaced. It is true that the original Navracel opinion states:

> An employer could not, of course, be protected by the provisions of the compensation act where he intentionally inflicts an injury upon an employee. Such an injury could hardly be said to be one which would be incidental to the employment, or one which would arise from the operation of the employer's business.

Id. at 510, 191 N.W. at 660.

However, the language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts. Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N.W. 1058 (1908). Navracel held that an employee who had not formally rejected the coverage of the compensation act could not sue his employer at law for the latter's

failure to guard certain machinery in violation of the factory act. It is obvious that read within the limitation of the Navracel facts, the obiter dictum upon which plaintiffs place so much emphasis did not adopt a rule of law which carved out an exception to the coverage of the compensation act. Indeed, Edelman v. Ralph Printing & Lithographing, Inc., 189 Neb. 763, 765, 205 N.W.2d 340, 341 (1973), disapproves Navracel to the extent "it may imply a necessarily different result under the [Workers'] Compensation Act compulsory upon" an employee who accepts benefits under the act. Plaintiffs have cited us to no case from this jurisdiction which has applied an intentional tort exception to the compensation act, nor has our research disclosed any such case.

To ask us to read the compensation act of this jurisdiction in such a way as

to require employers not only to provide workers' compensation benefits but also to defend and respond in damages to employee tort actions is to invite us to subvert the very purpose of the whole workers' compensation scheme. See Griffin v. George's, Inc., 267 Ark. 91, 589 S.W.2d 24 (1979). It is an invitation we decline.

We thus hold that the allegations of the plaintiffs against Gould fall within the ambit of this state's Workers' Compensation Act and that the district court is therefore without subject matter jurisdiction in regard to those allegations.

Remaining to be considered is plaintiffs' contention that to so construe the act is to subject them to involuntary servitude in violation of U.S. Const. amend. XIII and Neb. Const. art. I, §2, and to deprive them as well of due process

by denying them a remedy by due course of law for their injuries, in violation of U.S. Const. amend. XIV and Neb. Const. art. I, §§3 and 13.

Plaintiffs' involuntary servitude argument under the federal Constitution is foreclosed by the holding in U.S. v. Kozminski, ___ U.S. ___, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988), to the effect that the conduct proscribed by the 13th amendment is limited to the use or threat of physical force or legal coercion to extract labor from an unwilling worker. Thus, the deceit, howsoever intentional, alleged here does not constitute involuntary servitude within the meaning of the amendment. We find nothing in Neb. Const. art. I, §2, which requires different treatment than does the Constitution of our nation.

Plaintiffs' remaining constitutional arguments are resolved by noting that they have a remedy under the Workers' Compensation Act for all injuries proved to have been caused by an occupational disease arising out of and in the course of their employment with Gould, including both the initial effects caused by the work environment and any subsequent exacerbations of the same.

AFFIRMED.

SUPREME COURT OF NEBRASKA
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October 13, 1989

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IN CASE OF: 87-857, 87-874 ABBOTT V. GOULD

The following orders have been made:

Motion of appellants for order to stay mandate overruled. Corrected entry: Motion of appellant for rehearing overruled.

Respectfully,
CLERK OF THE SUPREME COURT